

FOR THE DEFENSE

Volume 1, Issue 1 -- April, 1991

The Newsletter for the
Maricopa County Public Defender's Office

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of the community, including prosecutors, victims' rights advocates and defense attorneys. Neal Taylor, formerly of our office, served as one of the committee members.

On April 11, 1991 the committee submitted its report to the State Bar and Arizona Supreme Court. The committee report recommends more than a dozen major changes to court rules and calls for the enactment of at least ten statutory provisions by the legislature. Further, the committee recommends that more study be made of changes necessary to implement 104 for post-conviction proceedings and extension of victims' rights to juvenile court.

Anticipating the victims' rights movement sweeping the nation, the Arizona Supreme Court previously addressed victims' rights in Rule 39 of the Criminal Procedure Rules. They were promulgated by the Supreme Court in July 1989.

The committee report makes recommendations that will cause drastic changes in how clients are defended. Some of them include the following:

*Amends Rule 8.5, Ariz. R. Crim. P., so that in any motion for continuance, the court takes into consideration the right of the victim to a speedy disposition of the case.

*Creates Rule 8.7, Ariz. R. Crim. P., to allow the trial court to accelerate a trial to the earliest date possible when special circumstances of the victim warrant it consistent with the defendant's right to a fair trial.

*Amends Rule 9.3(a), Ariz. R. Crim. P., to reflect a victim's right to be present in the courtroom and, upon motion, allow the court to direct the order of victims' testimony to insure a defendant's fair trial.

*Changes the rules of discovery and those relating to probation violations proceedings. Restitution would have to be paid "promptly" and the clerk of the court would be ordered to forward it "promptly" to the victim. Victims would also be allowed the opportunity to be present at probation modification proceedings and to be heard on any changes that would affect their safety.

*Changes Rule 39 in several ways. A major issue to defense lawyers is determining who is a victim. The committee rejected a proposal to authorize by rule a judicial hearing to determine that issue. The term "victim" would be liberally defined.

(cont. on pg. 2)

Victims' Bill of Rights Implementation

By Christopher Johns

Brace yourself for more changes to the criminal justice system as the Arizona legislature and the Supreme Court find ways to implement Proposition 104.

Arizona voters approved Proposition 104, the Victims' Bill of Rights, as an amendment to the state constitution on November 6, 1990. The amendment became effective on November 26, 1990, and is now codified as Article II, 2.1 of the Arizona Constitution. Proposition 104 gives victims the constitutional right "[t]o have all rules governing criminal procedure and admissibility of evidence in all criminal proceedings protect victims' rights...".

Shortly after Proposition 104's enactment, the Arizona Supreme Court requested the State Bar to form a committee to modify the Arizona court rules to incorporate the constitutional changes. The Proposition 104 Implementation Committee, headed by former ASU Law School Dean Paul Bender, was comprised of individuals from various segments

*Expands a victim's right to confer with the prosecutor not only on release issues, but also plea bargains, dismissals, use of pre-trial diversion programs or any other pre-trial disposition.

*Amends Rule 39 to require that all contact with victims, after charges are filed, would be exclusively through the prosecutor and no comment could be made at trial on the victim's exercise of his or her "right" to refuse to be interviewed.

*Changes Rule 39 to place various notification duties on prosecutors requiring them to give notice of all court proceedings to victims starting seven days after charges are filed all the way through post-conviction proceedings. Further, the court could not impose a sentence unless informed by the prosecutor that a victim has been notified of his or her right to restitution.

*Recommends legislation that would require law enforcement agencies to inform victims of their rights within 24 hours of initial contact with them, jails to notify victims and prosecutors whenever defendants make bail, courts to provide separate waiting areas for victim-witnesses, probation departments to expedite restitution, courts to authorize automatic wage assignments to collect restitution, DOC to calculate defendants' release dates and to inform victims of dates, and allow victims to address parole and post-conviction relief proceedings.

While these are only the committee recommendations, many of them track House Bill 2412, which was passed by the Arizona House of Representatives by a 55-1 vote this month. Representative Art Hamilton cast the only "no" vote. H.B. 2412 is now pending in the Senate and some of its provisions are even more draconian for defendants' rights. Since Proposition 104 is already law, look for the Supreme Court to act quickly to put something into effect before legislative enactments. Copies of the committee report are available from the State Bar and a copy of H.B. 2412 may be obtained from the Arizona House of Representatives. (See Amendment on page 10.)

Divided Attention

By James H. Kemper

Those of you who have tried DUI cases know something about divided attention. When a police officer gives your client a Romberg modified, he is not, he will tell the jury, concerned only with your client's physical abilities. He is as concerned with your client's ability to divide his attention, something very important to the safe operation of a car.

As a trial lawyer you must learn to divide your attention in the courtroom (lest you be beaten senseless someday by an enraged appeals lawyer). On the one hand you have to try to win your case, here and now, from this jury. It would be ideal if you could let this endeavor take up all your attention, but the fact is that you may lose the case no matter what you do and if this happens your client is going to want to appeal. It is to this possibility that you must give more

than a little attention at the same time you are trying to win the case during trial. The fact is that usually an appeals lawyer who inherits a case from you cannot reverse it without your help.

As a preface to the specifics you need to know in order to help an appeals lawyer win the case you lost, a few generalities may help. For example, it is useful to understand that, whereas in the trial court all presumptions are (in theory at least) in your favor, all are reversed at the appellate stage. They are all against the client for a very simple reason; by then the client has been convicted and the reversal of all presumptions is designed to insure that he stays convicted. That is why, as an example, the evidence on appeal is viewed in that light which will sustain the action of the trial court. And that is why so many actions of a trial judge are viewed as discretionary; on appeal they will only be overturned if the trial judge is found to have abused discretion.

If all this sounds hyper-technical, it is. Appellate courts do not want to reverse convictions. They will go out of their way to find that some otherwise compelling point has not been properly preserved for appellate review. And since you are the lawyer in the trenches it is you, and only you, who must make sure this doesn't happen.

Now here is the good news. There are three simple rules; if you follow them always, if you memorize them, you will never fail to make a record. You will never lose your client's case on appeal. You will never waive anything. And, as I say, you will be relatively safe from appeals lawyers.

The rules are:

1. Tell the judge exactly what it is you want him to do, or not do. Nothing fancy is required. Rather, it is brevity and clarity you are after. If you don't want him to do something the simple word OBJECTION will almost always suffice. If you want him to do something positive a short, plain English sentence will do. "I want you to give my instruction number 7." That sort of thing.

2. Tell the judge exactly WHY you want him to do it, or not do it. With evidentiary objections this is almost always accomplished with a single word, i.e., hearsay, relevance, foundation, etc. Even in other areas this can be done with a few words. But you must tell the judge WHY and you must be right in what you tell him.

3. Be sure the first two, the desired action or inaction and the reason GET IN THE RECORD. This means no unreported bench conferences. This means no agreements to make a record on something later. This means do not let a judge pressure you into doing something off the record. YOU MUST NOT LET THEM PUSH YOU AROUND and they will try. You are there to represent your client and most often you are all he has. You can always keep in mind that if you are prompt and honorable and polite, things you should be anyway, there is nothing a judge can do to harm you.

(cont. on pg. 3)

There is one other rule you also should know. If you follow the above three rules by telling the judge you want to ask a witness a question, telling him why and making sure it is in the record, and despite this he won't let you, then you must make an OFFER OF PROOF. This means you must tell the judge what the witness would have said had you been allowed to ask the question. Once again you need do nothing fancy; a simple sentence or two will do.

If you will train yourself to do these things mechanically you can spend more of your attention trying to get a not guilty verdict. Then you will make all the appeals lawyers happy. ^

The Supreme Court Confesses: Miranda is Alive & Well

By Carol A. Carrigan

You have just finished a voluntariness hearing and are entertaining thoughts of victory when the trial court judge says:

"As to voluntariness, I find that even though the defendant asked that his counsel be present during questioning the defendant was Mirandized, advised of his constitutional right to counsel, and by answering any questions he voluntarily waived his right to counsel."

Hopefully, you remove from your briefcase a copy of Minnick v. Mississippi, 111 S. Ct. 486 (1990) and request that, pursuant to this case, the ruling be reconsidered.

Minnick is a wonderful (surprising) case. In the decision, the Supreme Court seems to be saying: "We told you in Miranda v. Arizona; we gave you a bright-line rule in Edwards v. Arizona and we told you again in Roberson v. Arizona: the Fifth Amendment privilege means the right to have counsel present during interrogation." The following is an excerpt from a recent brief:

"Appellant's in-custody admissions were taken in violation of his right to counsel under the Fifth and Sixth Amendments. Once an individual in custody invokes his right to counsel, interrogation must cease until an attorney is present, and, at that point, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). Furthermore, when an accused invokes his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). And where an accused has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication. Arizona v. Edwards, *supra*. The concerns expressed by the United States Supreme Court in Miranda and Edwards are directed toward the necessity

of the presence of counsel as an adequate protective device for making the process of police interrogation conform to the dictates of the Fifth Amendment privileges. Minnick v. Mississippi, *supra*. The Edwards rule provides "clear and unequivocal" guidelines to the law enforcement profession. Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093 (1988). Despite these clear and unequivocal guidelines, however, it seems, given the parties in Miranda, Edwards and Roberson, that the law enforcement authorities in Arizona need constant reminding that they are not free to violate these guidelines. Edwards is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights. Michigan v. Harvey, 494 U.S. ____, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990)."

The United States Supreme Court in Minnick, *supra*, unequivocally makes clear that its decisions mean that an accused has the right to have counsel present during custodial interrogation and that Edwards and subsequent cases bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. The court in Minnick held:

"Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present, whether or not the accused has consulted with this attorney."

The trial court judge in the instant case was simply wrong when she held that, though the defendant may have invoked his right to have his attorney present before answering questions, he had waived his right to counsel by answering the officer's questions. The court in Minnick made clear that it would "insist" that neither admissions nor waivers are effective unless there are both particular and systematic assurances that the coercive pressures of custody are not the inducing cause.

Furthermore, the defendant's initial consultation with his attorney prior to his arrest and interrogation does not overcome the need for the presence of counsel during the interrogation process:

"We noted in Miranda that 'even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.' 384 U.S. at 470 (citation omitted)."

Defendant's statements were elicited during an in-custody interrogation after he had invoked his right to counsel in violation of his Fifth and Sixth Amendment rights. The statements should have been suppressed and should not have been presented to the jury. ^

SIDE BAR: Arizona v. Fulminante

As many of you may know, Steve Collins from the appeals division of our office represented Oreste C. Fulminante before the United States Supreme Court. The media reporting of the Fulminante decision may have made the case sound worse for our clients than it actually is (though the trend does not look good!).

Basically, the case does not change the law as far as the admissibility of coerced confessions. It holds that the admission of a coerced confession may now be harmless error on appeal. Actually, even this could be categorized as dicta as the court held that the admission of Fulminante's confession was not harmless error. However, as a practical matter the harmless error portion of the decision is now the law of the land.

The real implication for trial attorneys is that if a coerced confession is admitted at trial, they should make an adequate record so that it can be shown on appeal that the admission was not harmless error. The decision is a great victory for Mr. Fulminante, but it is a bad sign for our clients. Note that Justice Souter is willing to ignore precedent and join Justice Rehnquist in cutting back on defendant's rights.

Probation Conditions & Regulations Must Be In Writing

By James R. Rummage

Many of you may be unaware, as was I until recently, that not only must the conditions of probation be in writing, but any regulations imposed by the probation officer to implement those conditions must also be in writing. Rule 27.1, Arizona Rules of Criminal Procedure provides:

"The sentencing court may impose on a probationer such conditions as will promote rehabilitation. In addition, the appropriate probation officer may impose on the probationer regulations which are necessary to implement the conditions imposed by the court and not inconsistent with them. All conditions and regulations shall be in writing, and a copy of them given to the probationer."

Rule 27.7(c)(2) provides in part:

"Probation shall not be revoked for violation of a condition or regulation of which the probationer has not received a written copy."

State v. Jones, 163 Ariz. 498, 788 P.2d 1249 (App. 1990), a case handled by Anna Unterberger, Deputy Public Defender, before the trial court and by Steve Collins, Deputy Public Defender, on appeal, interpreted and applied the above rules. The Court of Appeals held in Jones that even though the defendant had been ordered in writing to "par-

ticipate and cooperate in and successfully complete any program of assistance, counseling, or therapy, whether outpatient or residential, as directed by the probation officer," he still could not be revoked for failing to complete the TASC program, because the probation officer's direction that he go to TASC was oral and not in writing.

A directive that a probationer attend a drug or alcohol rehabilitation program is the most likely situation in which Jones may apply, but it could certainly apply in other situations as well.

FOR THE DEFENSE

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SIDE BAR: We did it! This is the first office newsletter in a long time and we would like to keep it going, improve it and make it a worthwhile project. We need your ideas, comments, suggestions, articles and help to keep it going. We would like to make the newsletter something that will provide you with useful information to enhance our ability to represent clients.

If you have an idea, article, information or suggestion to improve the newsletter, please telephone (495-8200) or send us a speed memo.

SEMINAR CALENDAR FOR 1991

MAY:

3	**	MCPD & AZ Capital Rep. Project Seminar: Mitigation Evidence in Capital Cases	1:30-5:00	Phoenix
4		AACJ "DUI Seminar of the Year"		Tucson

JUNE:

7	**	MCPD Seminar: Criminal Law Ethics		Phoenix
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AUGUST:

3		Pennsylvania ACDL Mini-Seminar		Erie, PA
14-18		NACDL Annual Meeting & Seminar		Newport Beach, CA

SEPTEMBER:

20-21		Nevada Attorneys for CJ Seminar "How To Win on a Budget"		Las Vegas
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IN-HOUSE TRAINING OPPORTUNITIES

MAY:

10		Probation Violations	11:30-12:30	9th Floor Conference Room
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** MCPD = Maricopa County Public Defender's Office

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ARIZONA ADVANCED REPORTER

Volume 80

State v. Valdez

80 Ariz. Adv. Rptr. 9, February 21, 1991 (Sup.Ct.)

In closing argument, the prosecutor argues to the jury that defense counsel wants the jury to find the lesser included offense because he wants them to give him the plea bargain that the State would not. Defense counsel did not object. On post-conviction relief proceedings, the Arizona Supreme Court finds that it was not ineffective assistance of counsel to fail to object to this grossly improper comment. While defense counsel did not object because he did not know the proper objection, this single mistake was not deficient performance by defense counsel. In dissent, Justice Feldman argues that defense counsel's failure to object was below prevailing professional norms.

State v. Nunez

80 Ariz. Adv. Rptr. 3, February 21, 1991 (Sup.Ct.)

Defendant, indicted for first degree murder, is tried three times. At his first trial, the jury found him guilty of second degree murder. The verdict was overturned because of juror misconduct. At his second trial (for second degree murder), the jury returns a verdict of guilty of negligent homicide but not guilty of second degree murder and manslaughter. The verdict was again set aside for juror misconduct. At defendant's third trial, the jury finds him guilty as charged of negligent homicide. The jury was instructed that if negligence sufficed to establish an element of the offense, that element is established if the person acts intentionally, knowingly or recklessly.

On appeal, defendant claims that it violates double jeopardy to try him for acting intentionally, knowingly or recklessly after the prior acquittals. Defendant argues that the jury was improperly instructed because they could find that he acted negligently if he acted intentionally, knowingly or recklessly. The Arizona Supreme Court holds that the two previous jury verdicts make it a violation of double jeopardy to try him again for first degree murder, second degree murder or manslaughter. While the double jeopardy clause bars any subsequent prosecution in which the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted, the prosecution is not prevented from arguing that the defendant committed a negligent act in a knowing or intentional fashion.

The prosecution is also not collaterally estopped as to all issues actually litigated and adjudicated in the previous trials. Collateral estoppel is inapplicable because the prior proceedings do not provide the factual predicate necessary and because the previous proceedings did not result in a final judgment. The Court also finds that the defendant's motion for judgment of acquittal was properly denied because the defendant's testimony supplied substantial evidence to warrant conviction.

In dissent, Justice Feldman argues that double jeopardy and collateral estoppel bar a conviction for a negligent offense on theories that the defendant acted intentionally, knowingly or recklessly.

State v. Melendez

80 Ariz. Adv. Rptr. 46, February 21, 1991 (Div. 2)

Defendant is indicted for the first degree murder of a fellow prison inmate. Prison guards seize blood-stained clothes and other physical evidence from the defendant's cell. The Department of Corrections sets this matter for a disciplinary hearing and defendant requests the assistance of a jailhouse lawyer. In the criminal case, the State wishes to present inculpatory testimony from the jailhouse lawyer and physical evidence seized from the prison cell. The trial court bars the use of both. The trial court erred in finding that a search warrant was needed to search the defendant's cell. A prisoner has no constitutional right to privacy in his cell. The trial judge also erred in finding that there was any privileged communication between defendant and his jailhouse lawyer, as jailhouse lawyers are not attorneys within the meaning of the evidentiary privilege. Defendant was also not entitled to counsel at the prison disciplinary proceedings.

State v. Glasscock

80 Ariz. Adv. Rptr. 32, February 21, 1991 (Div. 1)

Defendant pleads guilty to armed robbery, a class 2 dangerous felony. The plea agreement provided that any sentence would not exceed fifteen (15) years and would be concurrent to any sentence imposed for his probation violation. In pronouncing sentence, the Court mistakenly stated that defendant was convicted of a non-dangerous offense. The trial judge sentences defendant to a seven (7) year prison term, believing it to be the presumptive sentence. The clerk calls the error to the judge's attention. The judge then imposes a mitigated sentence of nine (9) years for a dangerous offense. While judges have no inherent power to change a lawfully imposed sentence, under Rule 24.3 the Court may correct any sentence imposed in an unlawful manner within sixty (60) days. As the original seven (7) year sentence was actually a mitigated sentence and the judge had not put any mitigating factors on the record, it was unlawfully imposed because A.R.S. 13-702(c) requires that aggravating or mitigating circumstances be set forth on the record.

Quinton v. Superior Court

80 Ariz. Adv. Rptr. 23, February 19, 1991 (Div. 1)

Defendant was convicted of kidnapping and custodial interference and sentenced. Before sentencing, defendant is indicted for first degree murder for killing the kidnap victim. Defendant moves to dismiss the prosecution on double jeopardy grounds; the trial court denies the motion.

(cont. on pg.

7) In response to the defendant's special action, the State claims that defendant waived his claim of double jeopardy and that murder and kidnapping are not the same offense for double jeopardy purposes. Defendant did not waive his double jeopardy rights by not agreeing to a consolidation of the kidnapping and the murder cases. Double jeopardy is violated where the second prosecution is dependent upon the same conduct as the earlier prosecution. Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). The prosecution of the defendant for murder requires proof of exactly the same conduct on which the State based its kidnapping prosecution. However, dismissal of the murder charge without prejudice is appropriate because the defendant is currently appealing his kidnapping conviction.

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State v. Mada

81 Ariz. Adv. Rptr. 45, March 5, 1991 (Div. 2)

While under arrest, defendant telephones his attorney. During interrogation, he tells the police that he had been told by his attorney not to talk to them. The police asked him what he wants to do; defendant continues to speak and makes incriminating statements. Defendant's answer was not a clear invocation of his right to counsel and any invocation of his rights was equivocal. The police permissibly asked questions to clarify the defendant's intent.

State v. Reihley

81 Ariz. Adv. Rptr. 48, March 5, 1991 (Div. 2)

Defendant is released on bond. The bond surety learns that the defendant plans to flee and orally authorizes the police to arrest the defendant. Defendant is found with a large quantity of drugs during his arrest. A.R.S. 13-3885 provides that a bond surety may empower the arrest of the defendant in writing. The police did not receive prior written authority from the surety before they arrested the appellant. Violation of the statute requires suppression of the evidence found during the arrest. In dissent, Judge Roll argues that the tape recorded authorization of the surety is sufficient under the statute and failure to get written authority was mere technical error.

State v. Reynolds

81 Ariz. Adv. Rptr. 16, February 28, 1991 (Div. 1)

Defendant was placed on probation and ordered to participate in a residential drug treatment program. This is time spent "in custody" within the meaning of A.R.S. 13-709(B) and defendant is entitled to presentence incarceration credit for the time he spent in the program, contrary to State v. Vasquez, 153 Ariz. 327, 36 P.2d 803 (App. 1987). In dissent, Judge McGregor argues that the term "in custody" used in A.R.S. 13-709(B) refers only to time spent in the actual or constructive control of prison or jail officials.

State v. Sheehan

81 Ariz. Adv. Rptr. 21, March 5, 1991 (Div. 1)

A defendant on probation is revoked based upon a plea of guilty to two civil traffic offenses. While the terms of probation require defendant to obey all laws, for purposes of probation violation the phrase "obey all laws" is construed to exclude civil traffic offenses.

State v. Terrell

81 Ariz. Adv. Rptr. 42, February 28, 1991 (Div. 2)

Defendant falsely reports to the police that he was assaulted. Defendant is charged with filing a false report A.R.S. 13-2907.01. Defendant claims that the statute is unconstitutionally vague and overbroad because it gives the police unbridled discretion. It is also not sufficiently definite as to what kind of false report is covered and may have a chilling effect on First Amendment rights. Defendant's conviction is affirmed. The statute is specific enough to avoid any danger of arbitrary and discriminatory enforcement. Is not overly broad and does not violate the First Amendment.

State v. Stanley

81 Ariz. Adv. Rptr. 3, February 7, 1991 (S.Ct.)

Defendant murders his wife and daughter and is sentenced to death. During the investigation, defendant accompanies an investigator to a county building. During questioning, defendant states that he does not wish to say anything more until he can speak with an attorney. The investigator tells the defendant that incriminating items were found during a consent search. Defendant confesses. It was not a violation of the defendant's Sixth Amendment rights to continue questioning him because he was not in custody [though he had been read his Miranda rights]. Defendant's statements were voluntarily made.

The search warrant was issued by a magistrate present at the search scene. While having the magistrate sign the affidavits at the crime scene can interfere with the neutral and detached role of the magistrate, there was no error on the unique facts of this case.

The police search defendant's place of business on the permission of his sister-in-law. The sister-in-law's authority to consent to a search was properly inferred from her possession of the keys to the business. There was also evidence that the owners of the business, the defendant and his father, consented to the search.

Defendant filed an unsuccessful motion to voir dire the trial judge concerning bias or prejudice. There is no constitutional right to voir dire a trial judge and appellant failed to show any possible bias or prejudice to support the motion.

(cont. on pg. 8)

The trial judge also properly denied defendant's motion for change of venue due to pretrial publicity as defendant presented insufficient supporting evidence. The court also finds that the death penalty was properly imposed for killing his daughter [see also dissent].

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State v. West

82 Ariz. Adv. Rptr. 33, March 14, 1991 (Div. 1)

Defendant is charged with the assault and kidnapping of his girlfriend. Defendant claims on appeal that the prosecutor committed misconduct by impeaching him concerning his religious beliefs. However, the defendant testified several times on direct examination that his actions were justified by scripture. The defendant "opened the door" to questions concerning his defense of religious justification. While questions regarding religious beliefs are improper to either enhance or impeach witness credibility, no error occurred in this case.

During trial, appellant sought to substitute private counsel for the public defender. Retained counsel requested a sixty (60) day continuance to prepare. When new counsel said she could not prepare without a sixty day continuance, the trial judge permitted her withdrawal and ordered the public defender to remain trial counsel. As new counsel was not prepared to go to trial in compliance with Rule 6.3, there was no error in denying the motion to continue the firm trial date.

In a motion for new trial, retained counsel asserts that the public defender was ineffective. The trial judge found after a hearing that the public defender's conduct was reasonable and that defendant had failed to show any prejudice. Defendant also claims that his trial attorney was ineffective where he could not make a meaningful decision on whether to accept a plea offer when his attorney failed to interview witnesses prior to trial. This issue was not raised in the trial court and can only be considered on post-conviction relief.

State v. Serna

82 Ariz. Adv. Rptr. 22, March 12, 1991 Sup. Ct.

Defendant was convicted of the first degree murder of a fellow inmate at Perryville. Defendant moved to vacate the judgement claiming there was newly discovered evidence proving that a different inmate was the murderer. Defendant claims that the trial judge must accept his newly discovered testimony at face value and that only a new jury can assess the credibility of his witnesses. The trial judge correctly denied the motion where he found the testimony of the witnesses unworthy of belief. As the testimony would not probably change the jury's verdict, the trial judge did not abuse his discretion.

Cacavas v. Bowen

82 Ariz. Adv. Rptr. 41, March 19, 1991 (Div. 2)

New A.R.S. 28-692(A)(2) does not deny due process by changing relation back evidence into an affirmative defense. The statute is not unconstitutional simply because it does not contain the same elements of the statute it replaced. The statute does not unconstitutionally shift the burden of proof and is not overbroad.

State v. Stapley

82 Ariz. Adv. Rptr. 40, March 19, 1991 (Div. 2)

Defendant's probation is revoked for failing to pay any amount toward restitution. While probation may not be revoked where probationer is unable to pay, he is required to make sufficient bona fide efforts, including partial payments. There was no basis to accept defendant's contention that his terms of probation required "all or nothing" payments.

Mullet v. Miller

82 Ariz. Adv. Rptr. 46, March 19, 1991 (Div. 2)

Administrative proceedings before the Corporation Commission do not raise double jeopardy problems in a subsequent criminal prosecution for securities violations. However, administrative penalties which are punitive as opposed to remedial may cause double jeopardy problems.

State v. Quick

82 Ariz. Adv. Rptr. 49, March 20, 1991 (Div. 2)

Defendant is caught growing marijuana plants weighing 74.5 pounds on national forest land. Prosecution in state court was appropriate because the state retains criminal jurisdiction over national forest lands. However, a total plant weight of 74.5 pounds was insufficient evidence to support a factual basis of a guilty plea to A.R.S. 13-3405(C) requiring a weight of 8 or more pounds of usable marijuana.

Arizona Advanced Reporter case summaries are written by Robert W. Doyle and prepared for use by Maricopa County Public Defenders.

MARCH TRIALS

<u>Date</u>	<u>Attorney</u>	<u>Charge(s)</u>	<u>Result</u>
3/04	Elm	Theft	Not Guilty
3/04	G. Williams	POM f/s	Guilty
3/06	Billar	Child Abuse	Guilty
3/11	Howard	Robbery	Not Guilty
3/11	Bransky	Agg. Aslt.; Kidnap; Rape	Guilty
3/12	Steinle	Sex Abuse	Hung Jury
3/13	Billar	Agg. Aslt.	Guilty
3/18	Kula	Theft	D.V.
3/18	Graham	PODD f/s	Dismissed
3/18	B. Peterson	Forgery	Guilty
3/18	Green	Murder 2	Guilty-Mans.
3/19	Grant	Conspiracy to Sell ND	Guilty
3/19	Foreman	Agg. Aslt.	Mistrial
3/21	Ellig	DUI	Guilty
3/25	Claussen	SOND	Guilty
3/25	Coolidge	Leaving Scene Inj. Acc.	Hung Jury
3/25	Haas	Agg. Aslt.	Guilty
3/25	Vaca	Theft	Mistrial
3/25	G. Williams	Theft	D.V.
3/28	Foreman	SOM	Guilty

We would like to report accurate information about trials conducted by the office. Please make sure that the Chief Trial Deputy is informed of trials in progress and the result. Besides information about the charges, we also need to know the judge the case was tried before, the prosecutor and whether the client was found guilty of a lesser included offense(s). ^

PERSONNEL PROFILES

Robert Doyle joined our office on February 25th and is assigned to Trial Group D. Admitted to practice in 1982, Bob worked at the Arizona Court of Appeals as a staff attorney for seven years prior to moving to our office.

Lisa Gilels recently joined the office and is assigned to Trial Group A. Lisa served as a City of Phoenix Assistant Prosecutor for approximately 1 1/2 years. She obtained her law degree in 1987 from Vermont Law School after earning her B.A. in Forestry and Environmental Conservation at the University of Colorado.

Dan Patterson began at the office on March 4th and is assigned to Trial Group C. Dan has spent approximately eight years in private practice and is one of the small number of State Bar certified criminal attorneys in Arizona. He was admitted to the Arizona State Bar in 1979 after obtaining his law degree at the University of Miami in 1978.

Lesley Pillsbury started on April 8th as a secretary in Trial Group C. Lesley previously was employed at Gilcrease and Martin where she worked for a former deputy public defender, Jim Martin.

Donna Robertson began as a secretary in Trial Group B on April 1st. Donna has been employed as a legal secretary for attorneys handling civil matters in New York and California.

Timothy Ryan joined the office on February 25th and is assigned to Trial Group C. He was previously associated with Gilcrease and Martin. Tim was admitted to the Arizona State Bar in 1987 after receiving his law degree from the University of Arizona.

Susan Stillwell started as a secretary in Trial Group D on April 1st. Susan is familiar to many in the county system since she previously worked in the Preliminary Proceedings Court (PPC).

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### Victims' Bill of Rights

Constitution of the State of Arizona  
Article II -- Declaration of Rights

#### Section 2.1 -- Victims' Bill of Rights

Section 2.1. (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice system.

2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.

3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.

4. To be heard at any proceedings involving a post-arrest release decision, a negotiated plea, and sentencing.

5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.

6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.

7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.

8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.

9. To be heard at any proceeding when any post-conviction release from confinement is being considered.

10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.

11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

12. To be informed of victims' constitutional rights.

(B) A victim's exercise of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.

(C) "Victim" means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.

(D) The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.

(E) The enumeration in the constitution of certain rights for victims shall not be construed to deny or disparage others granted by the legislature or retained by victims.

Addition approved election Nov. 6, 1990, eff. Nov. 26, 1990.